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**BEFORE THE SURFACE TRANSPORTATION BOARD**

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STB FINANCE DOCKET NO. 35291

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**SUPPLEMENT TO REPLY IN OPPOSITION OF ASARCO INCORPORATED  
AND AMERICAS MINING CORPORATION TO STERLITE (USA), INC. –  
ACQUISITION AND OPERATION EXEMPTION – COPPER BASIN  
RAILWAY, INC., LINE IN PINAL AND GILA COUNTIES, AZ, VERIFIED  
NOTICE OF EXEMPTION OF STERLITE (USA), INC. PURSUANT TO  
49 C.F.R. §§ 1150.31-1150.34**

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ASARCO Incorporated and Americas Mining Corporation (together, the “Parent Companies”) hereby submit this Supplement to Reply in Opposition of ASARCO Incorporated and Americas Mining Corporation to Sterlite (USA), Inc. (“Sterlite”) – Acquisition and Operation Exemption – Copper Basin Railway, Inc., Line in Pinal and Gila Counties, AZ, Verified Notice of Exemption of Sterlite (USA), Inc. Pursuant to 49 C.F.R. §§ 1150.31-1150.34. Sterlite has improperly attempted to amend this Verified Notice of Exemption (“Notice of Exemption”) filed in connection with its proposed purchase and operation of the Copper Basin Railway (“the CBR”) through an unverified letter responding to deficiencies noted by the Surface Transportation Board (the “STB”). *See* Sterlite (USA), Inc. – Acquisition and Operation Exemption – Copper Basin Railway, Inc., Line in Pinal and Gila Counties, AZ, STB Finance Document No. 35291 (STB served August 19, 2009). For reasons set forth in this document, Sterlite has not properly amended its Notice of Exemption as required under 49 C.F.R.

§§ 1150.32(a) and 1150.33(h). Because Sterlite's Notice of Exemption remains defective, STB review of Sterlite's Notice of Exemption should be either denied or, at minimum, suspended.

## **I. BACKGROUND**

On August 14, 2009 Sterlite, in an attempt to push through regulatory approval for its proposed purchase and operation of the CBRY, filed a Notice of Exemption with the STB. *See Sterlite (USA), Inc. – Acquisition and Operation Exemption – Copper Basin Railway, Inc., Line in Pinal and Gila Counties, AZ, Verified Notice of Exemption of Sterlite (USA), Inc. Pursuant to 49 C.F.R. §§ 1150.31-1150.34.* The Parent Companies, on August 25, 2009 filed a Reply in Opposition to the Notice of Exemption. *See Reply in Opposition of ASARCO Incorporated and Americas Mining Corporation to Sterlite (USA), Inc. – Acquisition and Operation Exemption – Copper Basin Railway, Inc., Line in Pinal and Gila Counties, AZ, Verified Notice of Exemption of Sterlite (USA), Inc. Pursuant to 49 C.F.R. §§ 1150.31-1150.34, STB Finance Docket No. 35291 (STB served August 25, 2009) (“Reply in Opposition”).* The Reply in Opposition asserts that Sterlite's Notice of Exemption is deficient because it failed to include an Environmental Report which is required due to environmental sensitivities in connection with Sterlite's operation of the CBRY.<sup>1</sup>

After filing its Reply in Opposition, the Parent Companies discovered that Sterlite engaged in communications with the STB concerning Sterlite's failure to address

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<sup>1</sup> Sterlite also failed to comply with and sought to bypass employee notice requirements under 49 C.F.R. § 1150.32(e). *See Reply of ASARCO Incorporated and Americas Mining Corporation in Opposition to Sterlite (USA), Inc. – Acquisition and Operation Exemption – Copper Basin Railway, Inc., Line in Pinal and Gila Counties, AZ, Petition for Waiver of 49 C.F.R. § 1150.32(e), STB Finance Docket No. 35291 (STB served August 25, 2009).*

interchange disclosure requirements under 49 C.F.R. § 1150.33(h) in its Notice of Exemption. Apparently, Sterlite is attempting to address this defect through an unverified letter to the STB. Although governing statutes do not allow for amendments to a Notice of Exemption via phone calls or unverified correspondence, Sterlite has tried to cure a serious, substantive defect by talking with and sending an unverified letter to the STB.

## **II. STERLITE'S UNVERIFIED CORRESPONDENCE CANNOT MODIFY ITS DEFECTIVE NOTICE OF EXEMPTION**

On August 19, 2009, Sterlite filed with the STB a letter purporting to respond to concerns that its Notice of Exemption failed to include required disclosures under 49 C.F.R. § 1150.33(h) concerning provisions or agreements that may limit future interchange with third-party connecting carriers. *See Sterlite (USA), Inc. – Acquisition and Operation Exemption – Copper Basin Railway, Inc., Line in Pinal and Gila Counties, AZ*, STB Finance Docket No. 35291 (STB served August 19, 2009). Sterlite's Notice of Exemption contains none of the information required by 49 C.F.R. § 1150.33(h). Apparently, the STB planned to suspend review of the Notice of Exemption until Sterlite complies with this required disclosure. In response, Sterlite challenges the STB's proposed action by submitting a letter containing unverified (and incorrect) assertions that there are no provisions or agreements that may limit the CBRY's interchange commitments.

Sterlite's unverified letter cannot lawfully supplement Sterlite's Notice of Exemption. Under 49 C.F.R. § 1150.32(a) a party must verify all representations made in connection with a Notice of Exemption. This verification entails certifying, *inter alia*, that the practitioner is authorized to file such a pleading and believes there is good

ground for doing so. *See* 49 C.F.R. § 1104.4(a). While Sterlite's Notice of Exemption includes a verification,<sup>2</sup> its August 19, 2009 letter – obviously designed to communicate a substantive legal position and to explain an identified deficiency – does not.

Allowing Sterlite to amend its pleadings in an unverified manner contradicts reporting and verification requirements under 49 C.F.R. § 1150, *et seq.* The Parent Companies, and all other parties, have a due process right to respond to properly filed, verified pleadings. No party should be forced to respond to unverified letters or oral communications which interpose new factual assertions into a Notice of Exemption pending before the STB.

### **III. CONCLUSION**

Sterlite's Notice of Exemption is currently defective in at least two areas – it lacks an Environmental Report and it omits important information regarding interchange impact. An effort to supplement briefing to address these defects must be accomplished in a manner that complies with federal regulations requiring proper verification. After all, these regulations exist to safeguard the STB review and approval process and to

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<sup>2</sup> *See* Sterlite (USA), Inc. – Acquisition and Operation Exemption – Copper Basin Railway, Inc., Line in Pinal and Gila Counties, AZ, Verified Notice of Exemption of Sterlite (USA), Inc. Pursuant to 49 C.F.R. §§ 1150.31-1150.34, STB Finance Docket No. 35291 (STB served August 14, 2009), p. 9.

guarantee due process for all involved. Until Sterlite's Notice of Exemption is supplemented with a verified pleading that allows for appropriate review and challenge, Sterlite's Notice of Exemption should be rejected or suspended.

Dated: August 28, 2009

**MILBANK, TWEED, HADLEY & McCLOY LLP**

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### **CERTIFICATE OF SERVICE**

I hereby certify that I have served a true and correct copy of the above and foregoing document by electronic mail on this 28th day of August, 2009 on all parties of record in this proceeding.

/s/ Jason Cole

Jason Cole